

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11

12 JAMAL SMITH,

Civil No. 09-5315-RJB-JRC

13 Petitioner,

14 vs.

ORDER ON PETITION FOR
CERTIFICATE OF APPEALABILITY
AND ON APPLICATION TO PROCEED
IN FORMA PAUPERIS

15 RON FRAKES,

16 Respondent.
17

18 This matter comes before the Court on Petitioner's Petition for Certificate of
19 Appealability (Dkt. 27) and on Petitioner's application to proceed *in forma pauperis* (Dkt. 28).
20 The Court must consider whether to grant or deny the petitioner a Certificate of Appealability,
21 See 28 U.S.C. § 2253(c)(3), and whether to grant or deny the Petitioner's application to proceed
22 *in forma pauperis*. The Court has reviewed the record herein.

23 On October 14, 2009, U.S. Magistrate Judge J. Richard Creatura issued a Report and
24 Recommendation, concluding that petitioner's first and third claims should be dismissed after a
25 review of the merits of those claims. Dkt. 19. The Report and Recommendation recommended
26 that the Court find Petitioner's second claim was unexhausted and dismiss it as procedurally
27 barred. *Id.* The Report and Recommendation stated that his fourth claim should be dismissed as
28

1 Petitioner had filed a motion to voluntarily dismiss (Dkt. 15) that claim. *Id.* Petitioner then
2 filed a Motion to Strike, arguing that he wished to retract his motion to dismiss claim four (Dkt.
3 15), and have the Court review that claim. Dkt. 20.

4 On November 30, 2009, Petitioner's Motion to Strike was granted, and a review of his
5 fourth claim for relief was undertaken. Dkt. 25. The fourth claim was dismissed as unexhausted
6 and procedurally barred. *Id.* The Court adopted the Report and Recommendation as to the
7 remaining claims. *Id.*

8 The Report and Recommendation (Dkt. 19) and the Order on Motion to Strike and Report
9 and Recommendation (Dkt. 25) contain a through review of the facts which is adopted here.

10 Petitioner has now appealed to the U.S. Court of Appeals for the Ninth Circuit. Dkt. 27.
11 The Court construes a notice of appeal in a habeas proceeding as a petition for a certificate of
12 appealability under 28 U.S.C. § 2253.
13

14 **II. DISCUSSION**

15 **A. STANDARD FOR GRANTING A CERTIFICATE OF** 16 **APPEALABILITY**

17 The district court should grant an application for a Certificate of Appealability only if the
18 petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. §
19 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas
20 petitioner must make a showing that reasonable jurists could debate whether, or agree that, the
21 petition should have been resolved in a different manner or that the issues presented were
22 adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595,
23 1603-04 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court
24 denies a claim on procedural grounds, the petitioner must show that jurists of reason would find
25 it debatable whether the petition states a valid claim of the denial of a constitutional right and
26 that jurists of reason would find it debatable whether the district court was correct in its
27 procedural ruling. *Slack* at 1604.
28

1 **B. CERTIFICATE OF APPEALABILITY**

2 1. First and Third Claims

3 Petitioner's first and third claims were dismissed after a review on the merits. Dkt. 25.
4 Petitioner here has failed to make a showing that reasonable jurists could debate whether, or
5 agree that, his first and third claims should have been resolved in a different manner or that the
6 issues presented were adequate to deserve encouragement to proceed further. *Slack* at 1603.
7 The petition for a Certificate of Appealability should be denied as to these claims.

8 2. Second and Fourth Claims

9 This Court dismissed the second and fourth claims as unexhausted and procedurally
10 barred, and so these claims were dismissed on procedural grounds. *Slack* at 1604. There is
11 nothing in the record that would support a conclusion that a jurist of reason would find it
12 debatable whether these claims state valid claims of the denial of a constitutional right and that
13 jurist of reason would find it debatable whether this court was correct in its procedural ruling.
14 *Slack* at 1604. The petition for a Certificate of Appealability should be denied as to the second
15 and fourth claims.

16 **C. APPLICATION TO PROCEED *IN FORMA PAUPERIS***

17 Pursuant to Appellate Rule of Civil Procedure 24(a)(1), a "party to a district-court action
18 who desires to appeal *in forma pauperis* must file a motion in the district court." The Rule
19 further provides that the applicant must provide an affidavit that shows the party's inability to
20 pay, the claims and issues the party intends to present on appeal. Appellate Rule of Civil
21 Procedure 24(a)(1). Further, under 28 U.S.C. § 1915, any court of the United States may
22 authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or
23 criminal, or appeal therein without prepayment of fees or security therefore.
24

25 Petitioner's application to proceed *in forma pauperis* (Dkt. 28) should be granted.
26 Petitioner states that he has \$174.92 in an savings account and has \$12.44 in his account at
27 Clallam Bay Corrections Center. Dkt. 28, at 2. Petitioner has made a sufficient showing that he
28

1 is unable to pay the filing fee. Petitioner's notice of appeal indicates that he plans to appeal the
2 Court's decisions in the Order on Motion to Strike and Report and Recommendation. Dkt. 27.
3 His application should be granted.

4 **III. ORDER**

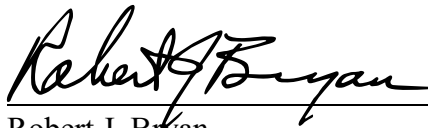
5 The Court hereby **FINDS** and **ORDERS**:

6 1) The Petition for a Certificate of Appealability (Dkt. 27) is **DENIED**;

7 2) Petitioner's application to proceed *in forma pauperis* (Dkt. 28) is **GRANTED**; and

8 The Clerk is directed to send copies of this Order to all parties appearing pro se, all
9 attorneys of record and to the Hon. J. Richard Creatura.
10

11 DATED this 21st day of January, 2010.

12 

13 Robert J. Bryan
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28